90-243

Supreme Court, U.S.
FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM R. BURT, and
JEAN P. BURT,

Plaintiffs-Appellants,

vs.

MAUI ARCHITECTURAL GROUP,
INC., and JAMES C. HESTAND,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT, STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

William R. Burt,
Jean P. Burt,
Plaintiffs-Appellants
Pro Se
480 Hoopalua Drive
Pukalani, Hawaii 96768
Tel: (808) 572-1162
BURT/cert/L-87-3

QUESTION PRESENTED FOR REVIEW

1. Is a wife who is jointly and severally liable under a contract with her husband, barred, under a theory of *res judicata*, from suing to protect her rights under that contract when her husband had been sued *individually* under the same contract in a different action?

2. Did the Supreme Court of the State of Hawaii err as a matter of law when it affirmed the judgment of the trial court which entered an Order Denying Plaintiffs'[-Appellants] Motion for Voluntary Dismissal?

3. Did the Supreme Court of the State of Hawaii err as a matter of law when it affirmed the judgment of the trial court which entered an Order Granting Defendants'[-Appellees] Motion for Summary Judgment?

LIST OF ALL PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM R. BURT, and JEAN P. BURT,	)
Plaintiffs-Appellants,	)
vs.	)
MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND,	)
Defendants-Appellees.	)

Petitioners WILLIAM R. BURT and JEAN P. BURT, hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii in this case.

OFFICIAL OPINIONS AND CHALLENGED ORDERS, SET FORTH IN APPENDIX

1. Judgment on Appeal by the Supreme Court of the State of Hawaii, No. 13918 filed May 2, '990. (Appendix A-1)

2. Denial of Motion for Reconsideration by the Supreme Court of the State of Hawaii, No. 13918 filed March 16, 1990. (Appendix A-3)

3. Memorandum Opinion of the Supreme Court of the State of Hawaii, No. 13918 filed March 2, 1990. (Appendix A-4)

4. Order Denying Plaintiffs Motion for Voluntary Dismissal by the Circuit Court of the Second Circuit, State of Hawaii filed on May 19, 1989. (Appendix A-12)

5. Order Granting Defendants' Motion for Summary Judgment by the Circuit Court of the Second Circuit, State of Hawaii filed on May 19, 1989. (Appendix A-16)

GROUNDS FOR JURISDICTION

1. On May 2, 1990 the Judgment on Appeal by the Supreme Court of the State of

Hawaii (No. 13918) was filed. (Appendix A-1).

2. On March 16, 1990 a Denial of Motion for Reconsideration by the Supreme Court of the State of Hawaii (No. 13918) was filed. (Appendix A-3).

3. This is the original petition for writ of certiorari, therefore Supreme Court Rule 12.3 does not apply to this petition.

4. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI, Clause 2. SUPREME LAW OF THE LAND.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Amendment XIV. --CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; ...

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. Section 1257 (a)
§ 1257. State court; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

4. Hawaii State Constitution, Article 1, Section 5.

No person shall be deprived of life, liberty or property without due process of

law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

5. Hawaii Revised Statutes Section 672-2 Actions against architects, professional engineers, surveyors, and landscape architects.

In any action for damages arising out of the alleged professional negligence of actions performed in the professional practice of a person holding a license as a professional engineer, architect, surveyor, or landscape architect under chapter 464, before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel.

6. Hawaii Rules of Civil Procedure 60 Relief From Judgment Or Order (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment upon which it is based has been reversed or otherwise vacated, or application; or (6) any other reason justifying relief from the operation of the judgment. The motion

shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nautre of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

1. This petition for writ of certiorari seeks review of decisions of the trial court and Supreme Court of the State of Hawaii which have deprived Plaintiff-Appellant Mrs. JEAN BURT of property with out due process of law.

2. Mrs. JEAN BURT and her husband Mr. WILLIAM BURT as OWNERS contracted with Defendants-Appellees as ARCHITECT for the design of their home. A dispute arose and Defendants-Appellees filed suit aginst Mr. WILLIAM BURT only, Mrs. JEAN BURT, was not a named defendant, [Maui Architectural Group, Inc., a Hawaii Corporation, Konrad Ground Contracting, aka Ground Contracting, Inc,. a Hawaii corporation v. W. R. Burt, Civil No. 5300(2) in the Circuit Court of the Second Circuit (Supreme Court No. 12259) (MAG v. BURT)]. Pursuant to an

arbitration provision in the standard form architectural contract the case was submitted to arbitration. Mr. WILLIAM BURT objected to arbitration. He lost the arbitration. Judgment was entered in the trial court, affirming the arbitration award, against Mr. WILLIAM BURT. Mr. WILLIAM BURT unsuccessfully appealed to the Hawaii Supreme Court (No. 12259) and to this Court (No. 88-575).

3. The cause of action that formed the basis of this lawsuit arose during the arbitration hearing. During that hearing Defendant-Appellee JAMES HESTAND testified to facts which lead Plaintiffs-Appellants to the conclusion that: (1) fraud in the inducement to cause Plaintiffs-Appellants to enter into the original architecture contract had occurred. The same testimony also constituted (2) evidentiary fraud during the arbitration hearing. The

testimony also disclosed that Defendants-Appellees JAMES HESTAND and MAUI ARCHITECTURAL GROUP had breached their (3) fiduciary duty to their clients Mr. WILLIAM and Mrs. JEAN BURT.

4. Thereafter Mr. WILLIAM and Mrs. JEAN BURT filed suit against MAUI ARCHITECTURAL GROUP and JAMES HESTAND alleging, among others things, the causes of action listed above.

Mrs. JEAN BURT also alleged in her complaint (paragraphs 53 - 65) that;

(a) although she was an OWNER on the architecture contract, she had not been named as a defendant in the original law suit that lead to the adverse arbitration ruling;

(b) the law suit filed against Mr. WILLIAM BURT did not allege that he was jointly and severally liable;

(c) the arbitration orders entered against her husband Mr. WILLIAM BURT, also affected her property interests and thereby injured her.

By so alleging Mrs. JEAN BURT first put Defendants-Appellees on notice that her right to not be deprived of property without due process of law was in issue.

To date that claim has not been addressed either by Defendants-Appellees, the trial court or the Supreme Court of Hawaii.

5. Defendants-Appellees alleged in their Answer to Complaint and in a subsequent motion for summary judgment that this claim should have been filed before the Design Professional Conciliation Panel pursuant to Hawaii Revised Statutes § 672-2. Plaintiffs-Appellants agreed and moved to voluntarily dismiss their

complaint so that the could file before the Design Professional Conciliation Panel.

6. On May 19, 1989 the trial court denied Plaintiff/Appellant's Motion and granted Defendant/Appellee's Motion for Summary Judgment.

These Orders were timely appealed to the Hawaii Supreme Court.

7. On March 2, 1990 the Hawaii Supreme Court issued a Memorandum Opinion affirming the trial courts orders. The Hawaii Supreme Court reasoned that:

(a) the claims against the Defendants-Appellees (architects) were arbitrated in the prior law suit; and

(b) the claim of fraud against the architects in the procurement of the arbitration award was subject to vacation under Hawaii Rules of Civil Procedure 60(b) when the trial court heard the competing motions to confirm or vacate the award.

8. On March 12, 1990 Plaintiffs-Appellants filed a motion for reconsideration of the Hawaii Supreme Court's Memorandum opinion of March 2, 1990. That Motion pointed out to the Hawaii Supreme Court that it had overlooked or misapprehended the fact that Plaintiff-Appellant JEAN BURT, was not a party to and could not respond to the original case of MAG v. Burt.

9. On March 16, 1990 the Hawaii Supreme Court summarily denied the Motion for Reconsideration.

10. On May 2, 1990 the Hawaii Supreme Court issued its Judgment on Appeal affirming the trial court orders.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

Mrs. JEAN P. BURT has been denied her fundamental rights to due process of law

guaranteed to her by the Fourteenth Amendment to the U.S. Constitution. She has not been permitted to pursue her claims against Defendants/Appellees because the trial court and the Hawaii Supreme Court have held that her claims are barred by res judicata.

Though these reasons might apply to Mr. WILLIAM R. BURT, they cannot be applied to Mrs. JEAN BURT since she was not sued by the architects or the contractor in the prior litigation and thus was not a party.

The contract for architectural services was between MAUI ARCHITECTURAL GROUP (MAG) and "Mr. and Mrs. Bill Burt (Jean)". All the monthly progress billings were addressed to "Mr. and Mrs. Bill Burt". As an "Owner" Mrs. JEAN BURT was jointly liable under the contract and answerable from her own funds.

It was pointed out to the Hawaii Supreme Court that Mrs. JEAN BURT had always resided with Mr. WILLIAM R. BURT and had been available for personal service. However for reasons not made clear to anyone MAG through its attorney at the time, Mr. James Krueger chose not to name Mrs. JEAN BURT as a defendant in the prior case. The full and complete title was Maui Architectural Group, Inc., a Hawaii Corporation, Konrad Ground Contracting, aka Ground Contracting, Inc,. a Hawaii corporation v. W. R. Burt, Civil No. 5300(2) in the Circuit Court of the Second Circuit (Supreme Court No. 12259). MAG and its attorney were clearly aware through the language of the contract that Mrs. JEAN BURT was an obligor under the contract. This was evidenced by the demand for arbitration letter sent to Shackely F. Raffetto, Esq., attorney for Mr. and Mrs.

BURT by the attorney representing MAG where he referred to the "agreement entered into by Mr. and Mrs. Burt and my client".

As a result of the error of the Hawaii Supreme Court, and the trial court that res judicata applies, Mrs. JEAN BURT has been damaged without ever having her day in court to attempt to rectify such damage.

The injury to Mrs. JEAN BURT was further aggravated when the Hawaii Supreme Court misapprehended the facts by stating "Mr. Burt entered into a contract with MAG..." [opinion at 2] and then applied the principles of res judicata against Mrs. JEAN BURT.

Mr. WILLIAM BURT opposed being ordered to arbitration in the earlier procedings, but Mrs. JEAN BURT was not a party to that action and could not have been ordered to arbitration because it had no in personam jurisdiction over her.

For the same reason Mrs. JEAN BURT had no standing to seek vacating or challenging the arbitration award and thus could not have moved under HRCP 60(b) to vacate the award for fraud.

The only remedy Mrs. JEAN BURT had was to file her own law suit. Mrs. JEAN BURT'S rights could not be waived by Mr. WILLIAM BURT, McShane v. Sherill 283 F.2d 462, 464 (CA 9th, 1960). Mr. WILLIAM BURT could not refuse to appear when served but he had no obligation to correct any error of pleading on the part of MAG.

Since Mrs. JEAN BURT was not afforded an opportunity to redress the injury to her she has been denied fundamental rights guaranteed to her by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 5 of the Hawaii

Constitution, which included:

(a) Notice;

(b) Hearing;

(c) Confrontation and Cross-Examination; and

(d) Discovery

Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970).

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM R. BURT
Appellant Pro Se

Dated: Wailuku, Maui, Hawaii, July 31, 1990

PROOF OF SERVICE

I, William R. Burt, Esq. a member of the United States Supreme Court, Defendant-Appellant Pro Se and attorney for Defendant-Appellant JEAN P. BURT, hereby certify that all parties required to be served have been served in compliance with Supreme Court Rule 28.3, by depositing a copy of the foregoing document in a United States Post Office, First Class postage prepaid, addressed to the counsel of record at their post office address listed as follows:

MADELYN D'ENBEAU, ESQ. and
MARY BLAINE JOHNSTON, ESQ.
90 Central Avenue
Wailuku, Maui, Hawaii 96732
Attorneys for Defendant-
Appellee Maui Architectural
Group, Inc,

and upon

RICHARD ROST, ESQ.
6th Floor
One Main Plaza
Wailuku, Maui, Hawaii 96732
Attorney for Defendant-
Appellee James C. Hestand

on this 31st day of July, 1990.

WILLIAM R. BURT
Defendant-Appellant
Pro Se
Attorney for Defendant-Appellant
JEAN P. BURT

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NO. 13918

IN THE SUPREME COURT OF THE
STATE OF HAWAII
OCTOBER TERM 1988
FILED May 2, 1990

WILLIAM R. BURT and JEAN P. BURT, Plaintiff-Appellants,	)	CIVIL NO. 87-0279 (2)
vs.	)	APPEAL FROM THE ORDER DENYING PLAINTIFF'S MOTION VOLUNTARY DISMISSAL AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND, Defendant-Appellees.	)	SECOND CIRCUIT COURT
	)	HONORABLE RICHARD R. KOMO, JUDGE

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court entered on March 2, 1990, the Orders of the Second Circuit Court 1) Denying Plaintiffs' Motion for Voluntary Dismissal filed May 19, 1989 and 2)

Granting Defendants' Motion for Summary Judgment filed May 19 1989, are affirmed.

DATED: Honolulu, Hawaii, May 2, 1990.

BY THE COURT:

/s/ Sandy H. Yasui
CLERK OF THE SUPREME COURT

APPROVAL:

/s/ H. Lum
JUSTICE

NO. 13918

IN THE SUPREME COURT OF THE
STATE OF HAWAII

FILED March 16, 1990

WILLIAM R. BURT and JEAN P. BURT, Plaintiff-Appellants, vs. MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND, Defendant-Appellees.	CIVIL NO. 87-0279 (2) APPEAL FROM (1) ORDER DENYING PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL, FILED MAY 19, 1989; (2) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED MAY 19, 1989 SECOND CIRCUIT COURT HONORABLE RICHARD R. KOMO, JUDGE

DENIAL OF MOTION FOR RECONSIDERATION

Appellants' Motion for Reconsideration is denied without argument.

DATED: Honolulu, Hawaii, March 16, 1990.

/s/

Steven Booth Songstad
on the motion for appellants

NO. 13918

IN THE SUPREME COURT OF THE
STATE OF HAWAII

FILED March 2, 1990

WILLIAM R. BURT and JEAN P. BURT, Plaintiff-Appellants, vs. MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND, Defendant-Appellees.	CIVIL NO. 87-0279 (2) APPEAL FROM (1) ORDER DENYING PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL, FILED MAY 19, 1989; (2) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED MAY 19, 1989 SECOND CIRCUIT COURT HONORABLE RICHARD R. KOMO, JUDGE

MEMORANDUM OPINION

Plaintiffs-Appellants William R. Burt and Jean P. Burt appeal from the Order Denying Plaintiffs' Motion for Voluntary Dismissal and the Order Granting Defendants' Motion for Summary Judgment,

both of which were entered by the Circuit Court of the Second Circuit on May 19, 1989. They would have us vacate the orders and remand the case for the entry of an order granting their motion for voluntary dismissal. But we conclude no error was committed by the circuit court and affirm the orders.

I.

A.

The controversy at bar stems from the preparation of architectural plans by Maui Architectural Group, Inc., (MAG) for Mr. Burt, which was the subject of an earlier appeal to this court. Mr. Burt entered into a contract with MAG for the preparation of architectural plans for a "residence and garage" in the Kula 200 subdivision, Kula, Maui, on December 19, 1978, agreeing to pay MAG twelve percent of construction costs for its services. On

July 9, 1979, Mr. Burt entered into two separate construction contracts with Konrad Grond Contracting (Grond) dated July 9, 1979, he agreed to pay Grond the sum of $192,000. The contract dated July 10, 1979, however, provided that he would pay Grond the sum of material and labor plus ten percent (10%) profit. The contracts also provided that disputes arising thereunder were "subject to arbitration."

Grond constructed a home "[p]ursuant to [MAG's] drawings, plans, and specifications." It submitted a bill for $253,928.85, but Mr. Burt paid the contractor only $171,657.64. On May 4, 1981 MAG and Grond filed a complaint against Mr. Burt, alleging they "provided valuable work, labor, materials and effort to" Burt who "wrongful[ly] refus[ed] to pay." They prayed for "such sums of money

and damages as are owed ... to the plaintiffs."

Mr. Burt responded on May 27, 1981, denying plaintiffs' allegation that he wrongfully refused to pay and asserting a multitude of defenses. He also brought a counterclaim against the plaintiffs, alleging causes of action for "Breach of Contract by Architect," "Negligence of Architect," "Negligent Infliction of Mental Distress by Architect," "Breach of Contract by Contractor," "Negligent Construction by Contractor," "Fraud and Conspiracy of ARchitect and Contractor," "Unfair and Deceptive Acts or Practices in the Conduct of a Trade or Business by Architect and Contractor," and "Willful Misconduct and Punitive Damages." He sought special, general, and punitive damages, fees and costs, and such other and further relief as the [c]ourt may deem to be just."

MAG and Grond moved for a stay of proceedings pending arbitration on July 8, 1981. And on October 14, 1982, the circuit court entered an order staying proceedings in court and directing that "all issues raised by the pleadings herein to date" be resolved through arbitration.

Arbitration commenced on January 5, 1987. On March 27, 1987, the arbitrators concluded Mr. Burt owed $73,275 more than he paid plus $8,000 in attorney's fees. The arbitrators also concluded Mr. Burt owed MAG $11,325.

MAG and Grond petitioned to confirm the arbitrators' award on April 9, 1987; two weeks later, Mr. Burt petitioned to vacate or modify the award. On May 13, 1987 the circuit court entered an order confirming the award. Mr. Burt appealed to this court, but we affirmed the circuit court. He then sought further review in

the United States
Supreme Court, but his petition was denied.

B.

The action at bar was filed by Mr. and Mrs. Burt in June 0f 1987; they named as defendants MAG and James C. Hestand, the architect who signed the contract with Mr. Burt as the representative of MAG. The Burts alleged the defendants fraudulently induced Mr. Burt to enter into the contract, committed fraud in the course of the arbitration hearing, breached the fiduciary duty owed by architects to clients, and conspired with the building contractor to conceal the architects' negligence supervising the contractor.

MAG sought a dismissal of the complaint or a summary judgment thereon on several grounds, including the failure of the Burts to first submit their claims to the Design Professional Conciliation Panel

established by Hawaii Revised Statutes (HRS) chapter 672. The Burts moved thereafter to voluntarily dismiss their suit so they could present their claims to the panel. The circuit court denied the Burts' motion and granted the architects' motion for summary judgment. The Burts' appeal to this court followed.

II.

Having reviewed the record on appeal, we conclude the circuit court did not err in denying the plaintiffs' motion to dismiss their suit so they could submit their claims to the conciliation panel and in awarding the defendants summary judgment. The claims against the architects, other than that alleging fraudulent conduct in the course of the arbitration, were arbitrated. Moreover, the claims were not of a nature cognizable by the Design Professional Conciliation

Panel established by HRS chapter 672. If the arbitrators' award was procured by fraud as the Burts allege, the award was subject to vacation when the circuit court heard the competing motions to confirm or vacate the award or upon a subsequent motion seeking relief from the court's order confirming the award pursuant to Rule 60(b) of the Hawaii Rules of Civil Procedure.

Affirmed.

DATED: Honolulu, Hawaii, March 2, 1990.

Steven Booth Songstad /s/
for Appellants

Mary Blaine Johnson
for Appellee Maui
Architectural Group

Richard Rost for
Appellee Hestand

MADELYN D'ENBEAU 1994
2145 Wells Street, #302A
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Telephone: 242-4545

Attorney for Defendant
Maui Architectural Group, Inc.

IN THE CIRCUIT COURT OF THE
SECOND CIRCUIT

STATE OF HAWAII
FILED MAY 19, 1989

WILLIAM R. BURT and JEAN P. BURT, Plaintiffs, vs. MAUI ARCHITECTURAL GROUP, INC., et al., Defendants.	CIVIL NO. 87-0279 (2) ORDER DENYING PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL

ORDER DENYING PLAINTIFFS MOTION FOR VOLUNTARY DISMISSAL

Plaintiff's Motion for Voluntary Dismissal having come on for hearing on March 23, 1989, before the Honorable Richard R. Komo, the argument and memoranda of counsel having been considered and the

Court finding it

has jurisdiction in the matter,

IT IS HEREBY ORDERED THAT

Plaintiffs' Motion be and hereby is denied.

DATED: Wailuku, Maui, Hawaii, May 19, 1989.

/s/ Richard R. Komo
Judge of the Above-Entitled Court

APPROVAL AS TO FORM:

/s/ Steven Booth Songstad
STEVEN BOOTH SONGSTAD
Attorney for Plaintiffs

/s/ Richard L. Rost
RICHARD L. ROST
Attorney for Defendant,
James C. Hestand

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Attorney for Defendant
Maui Architectural Group, Inc.

IN THE CIRCUIT COURT OF THE
SECOND CIRCUIT

STATE OF HAWAII
FILED MAY 19, 1989

WILLIAM R. BURT and JEAN P. BURT, Plaintiffs, vs. MAUI ARCHITECTURAL GROUP, INC., et al., Defendants.	CIVIL NO. 87-0279 (2) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment brought by Defendant Maui Architectural Group, Inc., and joined by Defendant James C. Hestand having come on for hearing on March 23, 1989, before the Honorable

Richard R. Komo,

the argument and memoranda of counsel having been considered and good cause appearing, therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Summary Judgment be and hereby is granted.

DATED: Wailuku, Maui, Hawaii, May 19, 1989.

/s/ Richard R. Komo
Judge of the Above-Entitled Court

APPROVAL AS TO FORM:

/s/ Steven Booth Songstad
STEVEN BOOTH SONGSTAD
Attorney for Plaintiffs

/s/ Richard L. Rost
RICHARD L. ROST
Attorney for Defendant,
James C. Hestand

NO. 13918

IN THE SUPREME COURT OF THE
STATE OF HAWAII

FILED March 12, 1990

WILLIAM R. BURT and JEAN P. BURT, Plaintiff-Appellants, vs. MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND, Defendant-Appellees.	CIVIL NO. 87-0279 (2) APPEAL FROM (1) ORDER DENYING PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL, FILED MAY 19, 1989; (2) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED MAY 19, 1989 SECOND CIRCUIT COURT HONORABLE RICHARD R. KOMO, JUDGE

PLAINTIFFS-APPELLANTS' MOTION FOR
RECONSIDERATION
AFFIDAVIT OF STEVEN BOOTH SONGSTAD
EXHIBITS A, B-1 - B-12, C

I. RELIEF SOUGHT

Plaintiffs-Appellants move this court, pursuant to HRAP 40, to reconsider it's

Memorandum Opinion filed on March 2, 1990. The grounds for this motion are that the Supreme Court has overlooked or misapprehended the fact that Plaintiff-Appellant JEAN BURT, was not a party to and could not respond to the original case of MAG v. Burt. The court reasoned that:

(a) the claims against the architects were arbitrated; and

(b) the claim of fraud against the architects in the procurement of the arbitration award was subject to vacation under HRCP 60(b) when the circuit court heard the competing motions to confirm or vacate the award.

Though these reasons apply to Mr. WILLIAM R. BURT, they cannot be applied to Mrs. JEAN BURT since she was not sued by the architects or the contractor in the prior litigation and thus was not a party.

II. ARGUMENT

1. MRS. JEAN BURT WAS AN OBLIGOR UNDER THE CONTRACT FOR ARCHITECTURAL SERVICES.

The contract for architectural services was between MAUI ARCHITECTURAL GROUP (MAG) and "Mr. and Mrs. Bill Burt (Jean)". All the monthly progress billings were addressed to "Mr. and Mrs. Bill Burt " (Exhibit A, the contract, Exhibits B-1 through B-12, the progress billings March 2, 1979 - June 9, 1980). As an "Owner" Mrs. JEAN BURT was jointly liable under the contract and answerable from her own funds.

Mrs. JEAN BURT has always resided with Mr. WILLIAM R. BURT and been available for personal service. However for reasons not made clear to anyone MAG through its attorney at the time, Mr. JAMES KRUEGER chose not to name Mrs. JEAN BURT as a defendant in the prior case. The full and complete title was Maui Architectural

Group, Inc., a Hawaii Corporation, Konrad Ground Contracting, aka Ground Contracting, Inc,. a Hawaii corporation v. W. R. Burt, Civil No. 5300(2) in the Circuit Court of the Second Circuit (Supreme Court No. 12259), (a copy of that complaint is Exhibit B to the complaint in this case (R. at 28-33)). MAG and its attorney were clearly aware through the language of the contract that Mrs. JEAN BURT was an obligor under the contract. This was evidenced by the demand for arbitration letter sent to Shackely F. Raffetto, Esq., attorney for Mr. and Mrs. BURT by the attorney representing MAG where he referred to the "agreement entered into by Mr. and Mrs. Burt and my client" (Exhibit C).

2. RES JUDICATA CANNOT APPLY AGAINST MRS. JEAN BURT.

As a result of the error of this Court, the court below and the attorney's

for MAG that res judicata applies, Mrs. JEAN BURT has been damaged without ever having her day in court to attempt to rectify such damage.

The injury to Mrs. JEAN BURT was inflicted when this Court misapprehended the facts by stating "Mr. Burt entered into a contract with MAG..." [opinion at 2] and then applies the principles of res judicata against Mrs. JEAN BURT.

Mr. WILLIAM BURT opposed being ordered to arbitration in the earlier procedings, but Mrs. JEAN BURT was not a party to that action and could not have been ordered to arbitration because it had no in personam jurisdiction over her. For the same reason Mrs. JEAN BURT had no standing to seek vacating or challenging the arbitration award and thus could not have moved under HRCP 60(b) to vacate the award for fraud.

3. MRS. JEAN BURT ONLY REMEDY WAS FOR HER TO FILE HER OWN ACTION

The only remedy Mrs. JEAN BURT had was to file her own law suit. Mrs. JEAN BURT'S rights could not be waived by Mr. WILLIAM BURT McShane v. Sherill 283 F.2d 462, 464 (CA 9th, 1960). Mr. WILLIAM BURT could not refuse to appear when served but he had no obligation to correct any error of pleading on the part of MAG's attorney.

4. MRS. JEAN BURT HAS BEEN DENIED FUNDAMENTAL RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT

Since Mrs. JEAN BURT was not afforded an opportunity to redress the injury to her she has been denied fundamental rights guaranteed to her by the Fourteenth Amendment to the United States Constitution and by Article 5, Section 1 of the Hawaii Constitution. Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970).

III. CONCLUSION

For the reasons stated Plaintiffs-Appellants request that this court reconsider its decision in its Memorandum Opinion filed March 2, 1990.

Dated: Wailuku, Maui, Hawaii, March 12, 1990.

/s/ Steven Booth Songstad
STEVEN BOOTH SONGSTAD
Attorney for Plaintiffs-Appellants

NO. 13918

IN THE SUPREME COURT OF THE
STATE OF HAWAII

WILLIAM R. BURT and JEAN P. BURT, Plaintiff-Appellants,	)	CIVIL NO. 87-0279 (2)
vs.	)	AFFIDAVIT OF STEVEN BOOTH SONGSTAD
MAUI ARCHITECTURAL GROUP, INC., and JAMES C. HESTAND, Defendant-Appellees.	)	

AFFIDAVIT OF STEVEN BOOTH SONGSTAD

STATE OF HAWAII)
) SS
COUNTY OF MAUI)

1. I am an attorney licensed to practice law in the State of Hawaii, and am the attorney of record for Plaintiffs-Appellants herein. I make this affidavit in support of this Motion to Reconsider pursuant to HRAP 40(b) upon personal knowledge except where it states otherwise. All

exhibits attached
hereto are true and correct copies;

2. I certify that this motion is presented in good faith, not for purposes of delay and, pursuant to DR 7-101, at the urgent request of my clients;

3. Exhibit A is the first page of the December 19, 1978 contract between "Owner: Mr. and Mrs. Bill Burt (Jean) and the Architect: Maui Architectural Group, Inc.";

4. Exhibits B-1 through B-12 are progress billing statements mailed to "Mr. and Mrs. Bill Burt" from MAG dated March 2, 1979 through June 9, 1980;

5. Exhibit C is a letter dated July 7, 1982 from James Krueger, Esq. then attorney for MAG to Shackley F. Raffetto,

Esq., then attorney for William Burt and Jean Burt; and

Further Affiant Sayeth Naught.

/s/ Steven Booth Songstad
STEVEN BOOTH SONGSTAD

Subscribed and Sworn to before me this 12 day of March 1990.

/s/ Esmeralda Bulosan
Notary Public, State of Hawaii

My commission expires: 2/6/93

SEAL

NOTE: EXHIBITS NOT ATTACHED TO THIS PETITION